



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Americable International, Inc.

File: B-225570

Date: May 5, 1987

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### DIGEST

1. Since General Accounting Office's bid protest jurisdiction is based on a finding that the protest concerns a procurement of property or services by a federal agency, the award by a federal agency of a franchise contract for cable television services is subject to GAO's bid protest jurisdiction.

2. Protest is sustained where General Accounting Office review of protester's proposal indicates agency erroneously concluded protester's proposal did not meet request for proposal's requirements.

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### DECISION

Americable International, Inc. protests the award of a cable television franchise to Antilles Trading Company pursuant to the Department of the Navy's request for proposals (RFP) No. N62470-86-B-7931. We sustain the protest.

On September 15, 1986, the RFP was issued by the United States Naval Base, Guantanamo Bay, Cuba, seeking proposals to provide the Naval Base with cable television services. The RFP required proposals to offer both a "basic service"<sup>1/</sup> and a "premium service"<sup>2/</sup> and stipulated that "premium service"

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<sup>1/</sup> Schedule D, paragraph 1(a) of the RFP required the basic service to consist of a minimum of 10 channels, 8 of which included: MTV, ESPN, WTBS, NICKELODEON, USA, ABC affiliate, CBS affiliate, and NBC affiliate.

<sup>2/</sup> Schedule D, paragraph 1(b) of the RFP required the premium service to consist of at least two of the following services: Home Box Office, Showtime, The Movie Channel, The Disney Channel, and Cinemax.

must be available to subscribers without the necessity of subscribing to the "basic service." The RFP also required the successful offeror to provide free "basic service" to all ships and duty rooms.<sup>3/</sup> Proposals were submitted by five offerors, including Americable and Antilles. The RFP provided that award would be made, as a general rule, to the franchise which submitted the lowest priced technically acceptable offer "for the broadest and best quality service", but also indicated award could be made to other than the low offeror, if justified by certain enumerated considerations, for example, equipment offered or repair capabilities.

On November 24, 1986, the Navy's Evaluation Committee reviewed the proposals and recommended award of the franchise to Antilles. By letter dated December 8, 1986, the Navy notified Americable that its proposal had not been selected. On December 18, Americable filed its protest with our Office.

Americable protests that its proposal met all the requirements of the RFP and was priced lower than that of Antilles. Accordingly, it maintains the award was improper.

The Navy has chosen not to present any arguments concerning the merits of this protest, opting to provide our Office with only the Evaluation Committee Meeting Minutes and copies of Americable's and Antilles' proposals. Rather than addressing the merits, the Navy argues merely that our Office is without jurisdiction to resolve this matter because it involves "an agreement that obligates no appropriated funds and which confers no direct benefit to the Navy."

Preliminarily, we reject the Navy's arguments concerning jurisdiction. Following enactment of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 et seq., our bid protest jurisdiction is based solely on a finding that the protest concerns a procurement of property or services by

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<sup>3/</sup> Paragraph 56 under the RFP section "General Requirements" stated:

"As consideration for the use of the government owned cable system, the government desires free basic cable service (basic tier) for all duty rooms (approximately 27) aboard the Naval Base and for visiting ships. . . ."

a federal agency. Artisan Builders, 65 Comp. Gen. 240 (1986), 86-1 C.P.D. ¶ 85; Monarch Water Systems, Inc., 64 Comp. Gen. 756 (1985), 85-2 C.P.D. ¶ 146. Our jurisdiction is no longer dependent on the expenditure of appropriated funds (see T.V. Travel, Inc., et al.--Request for Reconsideration, 65 Comp. Gen. 109 (1985), 85-2 C.P.D. ¶ 640), nor on the existence of some direct benefit to the Government (see Spectrum Analysis & Frequency Engineering, B-222635, Oct. 8, 1986, 86-2 C.P.D. ¶ 406). Accordingly, we find no merit in the Navy's contention that our Office lacks jurisdiction because the agreement obligates no appropriated funds and confers no direct benefit to the Navy.

The Navy also argues that its agreement to procure cable television services is merely an agreement to lease government property (i.e. the Government-owned cable television trunk system) under 10 U.S.C. § 2667 (1982), and not a procurement of property or services. We disagree. Here, the agreement concerns considerably more than a lease of the cable television trunk system. The primary purpose of the contract is clearly to provide cable television services to the Naval Base generally. In addition, the RFP stipulates that free cable service must be provided to all Navy ships and duty rooms.

Both before and after enactment of CICA, our Office has taken jurisdiction over bid protests concerning virtually identical procurements of cable television services by a federal agency. See Cable Antenna Systems, 65 Comp. Gen. 313 (1986), 86-1 C.P.D. ¶ 168; B.M.I., Inc., B-212286, Nov. 2, 1983, 83-2 C.P.D. ¶ 524; R & E Cablevision, B-199592, Feb. 19, 1981, 81-1 C.P.D. ¶ 110; Teleprompter of San Bernadino, Inc., B-191336, July 30, 1979, 79-2 C.P.D. ¶ 61. We have repeatedly concluded that our Office has jurisdiction to consider protests concerning this type of procurement. We again conclude that this type of solicitation clearly represents a procurement of services by a federal agency and that our Office has jurisdiction to consider the matter.

Turning to the merits, we are concerned that the Navy has chosen to provide us with limited documentation concerning the substance of the protest. Our Bid Protest Regulations, 4 C.F.R. § 21.3(c) (1986), require agencies to file complete reports with our Office concerning a protest. This section

of our regulations specifically requires that the agency's report include a statement by the contracting officer which is "fully responsive to all allegations of the protest which the agency contests." In declining to respond in full to the merits of the protest, the Navy has failed to comply with the regulatory requirements.

Based on the information before us, it appears that the Evaluation Committee erroneously and unreasonably disqualified Americable's proposal from consideration. The Evaluation Committee Meeting Minutes state that Americable's proposal failed to provide free cable service to ships and duty rooms and also failed to provide customers with the option of subscribing to premium channels without purchasing the "basic service".<sup>4/</sup> However, it appears that Americable did offer these required services.

The copy of Americable's proposal which the Navy sent to us clearly includes a provision offering to provide free basic cable service to ships and duty rooms. Tab 1 of Americable's proposal contains a section headed "Free Basic Tier - Ships and Duty Rooms." The services offered under this heading are precisely those specified in the RFP under Schedule D and Paragraph 56 of the section headed "General Requirements." Accordingly, we find no basis for concluding that Americable's proposal did not offer free basic cable service to the ships and duty rooms.

Based on our reading of Americable's proposal, it appears that Americable did offer customers the option of purchasing "premium service" without the necessity of buying the "basic service." We have reached this conclusion without the benefit of the Navy's analysis of Americable's proposal since the Navy declined to provide this information to us.

Americable's proposal contained two separate offerings of cable television services to base residents. First, under the heading "Tier I - Basic Cable - Free", the proposal listed a few channels that all base residents would receive without paying any fee whatsoever. The schedule of channels under this heading also listed three optional channels--The Movie Channel, Home Box Office (HBO), and Cinemax--which base

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<sup>4/</sup> Although the Committee expressed some concern with Americable's performance on prior contracts at other bases based on telephone conversations with those bases' user personnel, it appears that Americable's offer was rejected because of the alleged omissions.

residents could purchase for a monthly fee. These three optional channels were ones which met the Navy's requirement for "premium service".

The second offering of cable services in Americable's proposal responded to the RFP's requirements for "basic service" and was presented under the heading "Tier II - Basic Cable - \$4.95 Monthly". Under this heading, Americable listed twenty channels, including the eight required by the Navy for "basic service", which it offered subscribers for \$4.95 per month. The schedule of channels under this heading also listed three optional channels--The Disney Channel, Showtime and The Playboy Channel--which were available for an additional monthly fee. The list of available channels under this heading did not contain The Movie Channel, HBO, or Cinemax.

Since the three optional channels listed under "Tier I - Basic Service - Free" (The Movie Channel, HBO, and Cinemax) were listed in that schedule alone and were not listed in the schedule of channels offered under "Tier II - Basic Cable - \$4.95 Monthly", it appears that those three optional channels were offered exclusively under the "Tier I - Basic Cable - Free" service which Americable proposed to provide to all -- base residents. We note that the following footnote appeared under the "Tier I" heading.

"The Movie Channel (optional) will be available without the necessity of subscribing to the Basic Tier Service of \$4.95 per month or paying a refundable converter deposit."

This footnote seems to imply that only The Movie Channel--and not the two other optional channels listed under this heading--were available to customers without paying a converter deposit and/or subscribing to the "basic service" ("Tier II - Basic Cable - \$4.95 Monthly").

Although it is unclear why it was included, we do not think that this footnote overcomes our reading of the proposal that Americable offered customers the required "premium service" without the necessity of purchasing "basic service" at the \$4.95 rate. First, we find the implication in the footnote inconsistent with the fact that Americable listed all three channels (The Movie Channel, HBO, and Cinemax) under "Tier I - Basic Cable - Free" and none of them under "Tier II - Basic Cable - \$4.95 Monthly". This indicates to us that the three channels offered under "Tier I" did not require payment of the \$4.95 monthly fee. Second, concerning

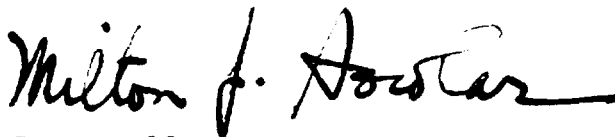
the refundable converter deposit mentioned in the above footnote, we note that Americable's proposal offers HBO and Cinemax on channels 10 and 11, which are within the normal VHF range. Thus, it appears that converters for these channels would be unnecessary, and there is no basis to assume that any deposit was necessary to obtain those premium stations, contrary to the footnote's implication.

Finally, the Evaluation Committee Meeting Minutes indicate that the committee compared the relative prices of the proposals on the basis of the cost for basic service plus one premium channel. Using this criterion, we find that Americable's proposal offers a price substantially lower than that of Antilles'.

In summary, we conclude that Americable's proposal did, in fact, offer free basic cable service to the ships and duty rooms and also offered the stipulated premium service with the option of purchasing it without the basic service. Accordingly, based on the information provided to us, we conclude that the Navy erroneously disqualified Americable from further consideration by concluding that Americable's proposal did not comply with the RFP's requirements.

The protest is sustained. —

The Navy has stated that the franchise agreement awarded under this solicitation is terminable at will, with no potential termination costs to the Navy. Accordingly, we recommend that the Navy reevaluate the proposal submitted by Americable. Upon reevaluation, the franchise agreement should be awarded consistent with the criteria established in the RFP, and if Americable is determined to be in line for award the franchise agreement with Antilles should be terminated and award made to Americable.



Acting Comptroller General  
of the United States